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Supreme Court of the United States

OCTOBER TERM, 1982

STATE OF ARIZONA, *Complainant*

v.

STATE OF CALIFORNIA, ET AL.

On Exceptions To The Special Master's Report

REPLY BRIEF OF THE CHEMEHUEVI, COCOPAH, COLORADO RIVER, FORT MOJAVE AND QUECHAN INDIAN TRIBES

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In the following portions of this Brief the Chemehuevi, Cocopah, Colorado River, Fort Mojave and

Quechan Indian Tribes (hereinafter "Tribes") address the arguments of the State Parties (hereinafter "States") in support of their numerous Exceptions to the Special Master's Report dated February 22, 1982[1], which fall within four basic areas of consideration.

The Tribes first dispute the States' contention that the Special Master erred in granting the Tribes leave to intervene in these proceedings. The final findings of the Special Master indicate the wisdom of his decision to permit intervention.

The Tribes next dispute the States' Exceptions to the Special Master's determination that the 1964 Decree

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1 See, Exceptions of the States of Arizona, California and Nevada and the other California Defendants to the Report of Special Master Elbert P. Tuttle; and Brief of said Parties in Support of Exceptions (hereinafter "States' Brief"); Exception of the State of Arizona to the Report of Special Master Tuttle dated February 22, 1982 and Brief in Support of Exception (hereinafter "Arizona's Brief"); and Exceptions of the California Agencies to the Report of Special Master Elbert P. Tuttle; Brief of said Parties in Support of Exceptions (hereinafter "California Agencies' Brief").

should be modified to allocate additional present perfected rights for all practicably irrigable lands which were within the undisputed boundaries of the Indian reservations and for which no rights were awarded in the prior proceedings (hereinafter the "omitted lands"). In the circumstances of this case, Article IX of the 1964 Decree is properly invoked to correct the substantial error in the prior proceedings.

The States' contention that the Special Master erred in finding that certain boundaries of the reservations had been "finally determined" under the 1964 Decree is additionally challenged by the Tribes. The additional rights claimed by the Tribes for practicably irrigable lands determined to be within the reservations as a result of boundaries being finally determined should be awarded without further delay.

Finally, the Tribes assert that the States' Exceptions to the Special Master's factual determination of practicably irrigable acreage is not supported by the record and should be rejected.

I. THE SPECIAL MASTER PROPERLY GRANTED THE TRIBES LEAVE TO INTERVENE.

The Special Master concluded that the Tribes satisfied the applicable criteria for intervention. (Special Master's 1979 Memorandum and Report at 6-14.) The States take minor exception to this conclusion. (States' Brief at 119, 125-127.)[2] Their principal objection to the Tribes' participation is founded on the States' sovereign immunity as embodied in the Eleventh Amendment to the Constitution. (States' Brief at 6-8, 118-127.)

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[2] Contrary to the States' contention (States' Brief at 126), the Special Master did not rely on Rule 24 of the Federal Rules of Civil Procedure to circumvent the Eleventh Amendment. See, Special Master's Report at 26-27. The States' additional argument that the Tribes must be denied intervention for failure to meet the requirements of Rule 24 is also without merit. See, Special Master's 1979 Memorandum and Report at 6-14; infra at 24.)

A. The Eleventh Amendment Cannot Bar the Tribes from Asserting Rights Against the Defendant California Agencies and other Private and Governmental Adverse Claimants Within the States.

The States' Exception to intervention based on the Eleventh Amendment is anomalous in one respect. As the States readily admit, their sovereign immunity defense is asserted by the three States in their parens patriae capacity. (States' Brief at 120-121.) In that capacity, states stand in judgment for their individual water users. New Jersey v. New York, 345 U.S. 369, 372-73 (1953); Wyoming v. Colorado, 286 U.S. 494, 506-09 (1932). Yet the Eleventh Amendment defense is not available to private individual water users, or even to political subdivisions or most other governmental entities. Mt. Healthy City Bd. of Education v. Doyle, 429 U.S. 274, 280 (1977).

From the inception of this case, the parties have included seven major California water users, named as parties defendant in Arizona's Complaint, all of which are political subdivisions or municipal corporations.

These entities are "the California parties most directly affected by additional water allocations to the reservations based upon the claims of enlarged reservation boundaries." (California Agencies' Brief at 5.) Yet, no argument is made, nor could one be constructed, that the Eleventh Amendment precludes the five Tribes from asserting rights against those agencies. Consequently, the Tribes should be able to assert and enforce in this proceeding the additional water rights awarded by the Special Master against these California agencies even if the Eleventh Amendment immunity of the three States is upheld. See, e.g., Edelman v. Jordan, 415 U.S. 651, 667 n. 12 (1974); Hopkins v. Clemson Agricultural College, 221 U.S. 636 (1911).

The situation presented by the Tribes' intervention vis-a-vis the California agencies and other water users other than the three States highlights the difficulties inherent in applying the States' Eleventh Amendment defense. In this suit, this Court has acquired exclusive jurisdiction over the subject matter, the States

are appearing parens patriae on behalf of their citizens, several of the existing parties are not immune from the Tribes' claims, and the three States' sovereign immunity has been waived "as a necessary feature of the formation of a more perfect Union... inherent in the constitutional plan." Principality of Monaco v. Mississippi, 292 U.S. 313, 329 (1934). The outcome of this case and the quantity of precious Colorado River water adjudicated to the Tribes should not hinge on such happenstance as Arizona's decision to join the California agencies while the United States and the other States were content to proceed solely against each other in their parens patriae capacities. Rather, the Tribes should be allowed to assert their claims against the three States as well as the California agencies.[3]

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[3] If intervention is allowed but limited by the Eleventh Amendment, the Tribes would then have to seek joinder of the principal water users in the three States to obtain complete relief. In these circumstances, application of the Eleventh Amendment would present an inconvenient, judicially uneconomical and unnecessary alternative.

B. The Eleventh Amendment Does Not Bar Intervention of Parties Other Than States and the United States in Original Actions.

This Court has previously granted intervention to parties in original actions whose claims against states would otherwise be barred by the Eleventh Amendment. Maryland v. Louisiana, 451 U.S. 725, 745-46 n. 21 (1981); Texas v. Louisiana, 416 U.S. 965 (1974); Oklahoma v. Texas, 258 U.S. 574, 581 (1922). In the most recent decision, Maryland v. Louisiana, supra, overlooked by the States, the Court expressly held that "our original jurisdiction is not affected by the provisions of the Eleventh Amendment (unless) the plaintiff State is actually suing to recover for injuries to specific individuals." The Court then accepted the Special Master's recommendation that seventeen pipeline companies be permitted to intervene as Plaintiffs and noted that "it is not unusual to permit intervention of private parties in original actions." 451 U.S. at 745-46 n.

21. This holding is dispositive of the States' Eleventh Amendment Exception.[4]

The most satisfactory general rationale for permitting intervention in original actions is the Court's ancillary jurisdiction. That doctrine is "bottomed on the notion that since federal jurisdiction in the principal suit effectively controls the property or fund under dispute, other claimants thereto should be allowed to intervene in order to protect their interests without regard to jurisdiction." Aldinger v. Howard, 427 U.S. 1, 11 (1976). In this case, the Court has acquired and retained exclusive jurisdiction to determine the quantity of water that has been reserved for the benefit of the five Indian reservations. (Special Master's Report at 27.) Accordingly, the Special Master properly placed primary

4 There is no mistaking the import of the Court's unequivocal and unconditional grant of intervention in the same footnote that it reached and resolved the ultimate merits of the suit. Maryland v. Louisiana, supra, firmly establishes that the Eleventh Amendment does not bar intervention against states in original actions as long as the intervenor's claims are encompassed within the subject matter of the action.

reliance on this Court's ancillary jurisdiction in holding that the Eleventh Amendment does not bar the Tribes' intervention against the States for the purposes of supporting the claims made on their behalf by the United States and of advancing their own additional claims. (Special Master's 1979 Memorandum and Report at 19-24.)

The States' sole argument against the Special Master's reliance on this Court's ancillary jurisdiction is that "(a)ncillary jurisdiction applies to claims and is not concerned per se with what parties assert those claims." (States' Brief at 121.) This assertion is mistaken. The extensive discussion of both pendent and ancillary jurisdiction in Aldinger v. Howard, supra, at 10, makes clear that the latter, in contrast to the former, has traditionally involved the addition of parties rather than claims. 427 U.S. at 6-16. See, e.g., 427 U.S. at 10: "Under this doctrine (of ancillary jurisdiction), the Court has identified certain considerations which justified the impleading of parties with respect to whom there was no

independent basis of federal jurisdiction." The cases discussed in Aldinger, Freeman v. Howe, 65 U.S. (24 How.) 450, 460 (1861); Stewart v. Dunham, 115 U.S. 61, 64 (1885); and Supreme Tribe of Ben-Hur v. Cauble, 255 U.S. 356, 364-67 (1921), involve intervention by parties over whom the courts originally would have lacked jurisdiction for one reason or another but were nevertheless allowed or ordered to participate owing to the courts' previously acquired jurisdiction over the subject matter. This case is no different.

The States' reliance on Owen Equipment and Erection Co. v. Howard, 437 U.S. 365 (1978), and a subsequent part of the Aldinger opinion, 427 U.S. at 16-17 (States' Brief at 121), is misplaced because those cases concern statutory limitations on a federal court's jurisdiction over non-federal claims. See, Owen, supra, 437 U.S. at 372. In this case, by contrast, the Tribes' claims are predicated entirely on federal law, Colorado River Water Conservation District v. United States, 424 U.S. 800, 813 (1976), and there are no statutory

impediments to the resolution of those claims in the federal court system. Cappaert v. United States, 426 U.S. 128, 145 (1976); Colorado River Water Conservation District v. United States, supra, 424 U.S. at 807-09; Arizona v. California, 373 U.S. 546, 596-601 (1963). The only question here is whether the Eleventh Amendment precludes the Tribes from asserting their claims against the three States to a res over which the Court has acquired and is exercising exclusive jurisdiction. The Special Master was correct in concluding that the doctrine of ancillary jurisdiction compels a negative answer to that question. Maryland v. Louisiana, supra.[5]

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5 The States rely on the Court's denial of the Navajo Tribe's Motion for Leave to Intervene in the prior proceedings. Arizona v. California, 368 U.S. 917 (1961), reconsideration den., 368 U.S. 950. States' Brief at 126-27. But these summary orders do not provide any support to the States' Eleventh Amendment argument. The Navajo's Motion was late and was opposed by the United States. The Master declined to rule on the Navajo's rights which were not affected by the Court's decree. See, Arizona v. California, 373 U.S. 546, 595 (1963). The denial of intervention could have rested on any one of numerous grounds, including untimeliness and failure to then satisfy the applicable criteria. There is no basis for assuming that the Eleventh Amendment had anything to do with the Court's decision.

C. 28 U.S.C. §1362, In Conjunction With the Constitutional Plan, Overcomes the States' Eleventh Amendment Immunity in This Case.

The Eleventh Amendment provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The Amendment itself does not by its terms encompass suits by Indian tribes against states because Indian tribes are neither citizens of another state nor citizens or subjects of any foreign state. United States v. Wheeler, 435 U.S. 313, 322-28 (1978); Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831). Nevertheless the Amendment has been construed broadly to preclude unconsented suits against a state by one of her own citizens Hans v. Louisiana, 134 U.S. 1 (1890), by foreign states, Principality of Monaco v. Mississippi, 292 U.S. 313 (1934), and by federal corporations, Smith v. Reeves, 178 U.S. 436 (1900), based on the theory that the Amendment maintains the states' preexisting immunity from suit in

the federal courts except where the waiver of that immunity is inherent in the constitutional plan. Principality of Monaco, supra, 292 U.S. at 322-23, 328-30. It is also well established, as conceded by the States (States' Brief at 122), that the states' immunity can be abrogated by Congress. Hutto v. Finney, 437 U.S. 678, 693 (1978); Employees v. Missouri Public Health & Welfare Dept., 411 U.S. 279, 282-87 (1973); Parden v. Terminal R. Co., 377 U.S. 184, 190-92 (1964).

Indian tribes are, of course, part of the constitutional plan. The Commerce Clause, art. I, §8, cl. 3, empowers Congress "(t)o regulate Commerce with foreign Nations, and among the several States, with the Indian Tribes." The Indian Commerce Clause has been utilized as "a shield (that) protect(s) Indian tribes from state and local interference," Merrion v. Jicarilla Apache Tribe, 102 S.Ct. 894, 910 (1982), in furtherance of the constitutional plan under which the regulation of Indian affairs is "committed exclusively to the government of the Union." Worcester v. Georgia, 31 U.S. (6 Pet.) 515,

561 (1832). Consequently, the Indian Commerce Clause, like the Fourteenth Amendment, necessarily entails inherent limitations on state sovereignty. Compare, Fitzpatrick v. Bitzer, 427 U.S. 445, 456 (1976). The States may have surrendered their immunity by virtue of the Indian Commerce Clause where, as here, tribes sue states to prevent interference with rights secured by federal law.[6]

In this case, there is no need to consider whether the Indian Commerce Clause, standing by itself, would suffice to overcome the States' Eleventh Amendment defense to the Tribes' water rights claims. Acting pursuant to that clause,[7] Congress in 1966

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6 In United States v.Minnesota, 270 U.S. 181, 193-95 (1926), the Court assumed in dictum that unconsented suits by Indians against states were precluded by the Eleventh Amendment. The Court did not consider the unique sovereign status of the Indian tribes or their place in the constitutional plan. See, Special Master's 1979 Memorandum and Report at 18 n. 30.

7 See, Merrion v. Jicarilla Apache Tribe, 102 S.Ct. 894, 911 n. 21 (1982); McClanahan v. Arizona Tax Commission, 411 U.S. 164, 172 n. 7 (1973).

enacted 28 U.S.C. §1362, which confers federal district court jurisdiction over suits brought by Indian tribes that arise under the Constitutions, laws or treaties of the United States. This statute was intended to provide "the means whereby the tribes are assured of the same judicial determination whether the action is brought in their behalf by the Government or by their own attorneys." H.R. Rep. No. 2040, 89th Cong. 2d Sess. 2-3 (1966), reprinted in 1966 U.S. Code Cong. & Ad. News, 3145, 3147. Based on that legislative history, this Court found in Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 473 (1976), that "Congress contemplated that a tribe's access to federal court to litigate a matter arising 'under the Constitution, laws or treaties' would be at best in some respects as broad as that of the United States suing as the tribe's trustee."[8] The Special Master

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8 Although by its terms Section 1362 is limited to suits brought in the federal district courts, it should be given the same effect in original actions in this Court which arise under federal law and implicate a tribe's vital interests. See, California v. Arizona, 440 U.S. 59 (1979). See also, Special Master's Report at 27 n. 58; Special Master's 1979 Memorandum and Report at 31.

followed the teaching of Moe and held that Section 1362 overcomes the three States' Eleventh Amendment immunity in the particular circumstances presented by this case. (Special Master's 1979 Memorandum and Report at 26-31; Special Master's Report at 27.)[9]

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9 This Court has held that the applicable standard for determining whether the States' immunity has been limited or abrogated depends upon the subject matter and background of the legislation at issue as well as its relationship to the Constitution. Hutto v. Finney, 437 U.S. 678, 698 n. 31 (1978). Section 1362 was enacted against the backdrop of more than a century of disputes and litigation in which the interests of the states frequently came into conflict with those of the United States and the tribes. See, e.g., Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1 (1831); Williams v. Lee, 358 U.S. 217 (1959); Warren Trading Post v. Arizona Tax Comm'n., 380 U.S. 685 (1965). See generally, Oneida Indian Nation v. County of Oneida, 414 U.S. 661, 667-74 (1974). Indeed, the very suit which prompted the enactment of Section 1362, Yoder v. Assiniboine and Sioux Tribes of the Fort Peck Indian Reservation, 339 F.2d 360 (9th Cir. 1964), see H.R. Rep. No. 2040, 89th Cong. 2d Sess. 2, 4-5 (1966), reprinted in 1966 U.S. Code & Ad. News, 3145, 3146-47, 3149, was a challenge to a state oil and gas commission's authority over tribal minerals. These circumstances make it plain that in enacting Section 1362, Congress contemplated that tribes would become increasingly active in litigation to enforce and protect their rights and that such suits would undoubtedly pit the tribes and the states as adversaries. Some limitation of the states' Eleventh Amendment immunity therefore must have been intended. See also, Special Master's 1979 Memorandum and Report at 29-31.

The States concede that Section 1362 as applied in Moe could overcome the Eleventh Amendment defense. (States' Brief at 122-25.) Their principal contention is that their Eleventh Amendment immunity remains intact so long as the United States appears in the litigation as the Tribes' trustee. (States' Brief at 122, 123.)

There is no basis for construing Section 1362 in such a "crabbed and restrictive" manner. See, McClanahan v. Arizona Tax Comm'n., 411 U.S. 164, 176 (1973). The effect of that interpretation here would be to impose a Hobson's choice on the Tribes: either forego the Government's legal representation of tribal interests against the States (assuming that the Tribes have any choice in the matter) or face the prospect that the Tribes' claims beyond those asserted by the Government will be foreclosed by the States' Eleventh Amendment immunity. The United States would confront a similar dilemma. The consequence of bringing or entering

litigation against a state on a tribe's behalf would be to impose a limit on the nature, scope and the extent of relief that the tribe might be able to obtain if it litigated on its own. It is virtually impossible to make intelligent decisions on such important matters at the onset of litigation, prior to any discovery, when the facts and underlying legal theories are not fully developed. Yet, under the States' theory, the United States and the Tribes would have to decide at a very early stage in the litigation which party would initiate suit. A further complication is that in the case of the Government initiating suit, there is no guarantee that the Government's positions and arguments might be modified or even abandoned during the course of litigation. See, e.g., United States v. Michigan, 653 F.2d 277, 278 (6th Cir. 1981), cert. den. _____ U.S. _____; Colville Confederated Tribes v. Walton, 647 F.2d 42, 46 n. 6 (9th Cir. 1981), cert. den. _____ U.S. _____.

The States attempt to draw support for their theory from Moe and the legislative history of Section

1362. (States' Brief at 122-23, 124 n. 56.) The Court in Moe does refer to the statement in the legislative history of Section 1362 that the proposed law "would provide for United States district court jurisdiction in those cases where the United States Attorney declines to bring an action and the tribe elects to bring the action." H.R. Rep. 2040, 89th Cong. 2d Sess. 2 (1966), reprinted in 1966 U.S. Code Cong. & Ad. News, 3145, 3147; Moe, supra, 425 U.S. at 472. Yet, the Court then continues in explanation with a specific reference to the situation in which tribes and the United States litigate as "coplaintiff(s)".[10] 425

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10 It has become commonplace in recent years for the United States and the tribes (or individual Indians) to appear jointly before this Court and present identical or largely overlapping claims. See, e.g., Merrion v. Jicarilla Apache Tribe, 102 S.Ct. 894 (1982); Montana v. United States, 450 U.S. 544 (1981); Washington v. Confederated Tribes of the Colville Reservation, 447 U.S. 134 (1980); United States v. Clarke, 445 U.S. 253 (1980); Washington v. Fishing Vessel Ass'n., 443 U.S. 658 (1979); and Wilson v. Omaha Indian Tribe, 442 U.S. 653 (1979). No one has objected to or challenged this practice. Nor is this case alone in presenting a situation in which the positions asserted by the Indian litigants goes beyond the contentions advanced by the United States on their behalf. See, e.g., United States v. Clarke, supra, 445 U.S. at 254 n. 1.

U.S. at 473. Congress was aware that there would not be any reason to confer jurisdiction when the United States initiates litigation on a tribe's behalf because 28 U.S.C. §1345 provides a federal forum for all suits brought by the United States. H.R. Rep. No. 2040, 89th Cong. 2d Sess. 3, 5 (1966), reprinted in 1966 U.S. Code Cong. & Ad. News, 3145, 3147, 3149. See, e.g., Colorado River Water Conservation District v. United States, 424 U.S. 800, 806-807 (1976). But there is nothing in the legislative history or in Moe to indicate that the congressional purpose of "assur(ing) the same judicial determination whether the action is brought on (the Tribes') behalf by the government or by their own attorneys,"[11] would vary depending upon whether jurisdiction was initially invoked by the Tribes under Section 1362, by the United States

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11 H.R. Rep. No. 2040, 89th Cong. 2d Sess. 2-3 (1966), reprinted in 1966 U.S. Code Cong. & Ad. News, 3145, 3147.

under Section 1345, or, for that matter, by a state or the United States pursuant to this Court's original jurisdiction, under 28 U.S.C. §1251.

The States' contention is equally deficient from a policy perspective. Insofar as it would encourage the United States to stay out of Indian litigation, it would act as a deterrent to the fulfillment of the Government's trust responsibilities, and, in addition, would leave litigants vulnerable to a subsequent suit by the United States since the Government would not be bound by any determination reached in its absence. Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 371 n. 9 (1968); United States v. Candelaria, 271 U.S. 432 (1926). Insofar as the States' position would discourage or prevent tribes from litigating jointly with the United States, it would undercut the congressional objectives of "fostering tribal self-government," Merrion v. Jicarilla Apache Tribe, 102 S.Ct. 894, 902 n. 5 (1982), and promoting "maximum Indian participation . . . in the planning, conduct and administration of (federal) programs and services . . .

through the establishment of a meaningful Indian self-determination policy." 25 U.S.C. §450a; see, White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143 n. 10 (1980). Cf., Trbovich v. United Mineworkers, 404 U.S. 528 (1972), discussed in Special Master's 1979 Memorandum and Report at 12-14. See also, infra, at 24. And any litigation in which the United States purports to provide exclusive and complete representation to Indian tribes may also be subject to collateral attack if the Government's conflicts of interest result in a denial of the tribe's constitutional right to procedural due process. See, Hansberry v. Lee, 311 U.S. 32 (1940); United States v. Truckee-Carson Irrigation District, 649 F.2d 1286 (9th Cir. 1981). (Special Master's Report at 37, 52 n. 67, 54 n. 71.) Finally, assuming arguendo that tribes can take advantage of their relationship to the United States only when the United States declines to participate on their behalf, the States have not offered any reasons why this condition is not satisfied with respect to the Tribes' additional water

rights claims over and above the quantities sought by the United States.[12]

For all of these reasons, the Eleventh Amendment does not and should not bar the Tribes' intervention.

D. The Government's Representation of Indian Interests in Litigation is Neither Complete Nor Exclusive.

The States object to the Tribes' intervention in this case on the grounds that the Government's

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12 Section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. §476, empowers tribes "to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe." This provision was expressly aimed at preventing disposition of tribal assets by federal officials. S. Rep. No. 1080, 73d Cong. 2d Sess. 1 (1934); 1 Opinions of the Solicitor of the Department of the Interior Relating to Indian Affairs 1917-1974 at 657 (GPO 1979). As perfectly illustrated by this case, the absence of tribes from litigation in which their property rights are at issue might well result in the effective "disposition" of tribal assets by federal officials without tribal involvement or consent. See, United States v Winnebago Tribe of Nebraska, 542 F.2d 1002, 1004 n. 4 (8th Cir. 1976).

representation of tribal interests is "complete," citing the early case of Heckman v. United States, 224 U.S. 413 (1912). (States' Brief at 121, 127.)

Heckman held that Indian allottees are not necessary parties to a suit brought and prosecuted by the United States to enforce restrictions against alienation that had been violated by the Indians. Since the Government was charged by law with enforcing the restriction, which operated as a limitation on the Indians' control over their allotments, the Indians could not be allowed to intervene and take any inconsistent action. In this sense, the representation provided by the Government was said to be "complete". 224 U.S. at 444-45.

At the same time, the Heckman Court noted that the Executive Department has discretion to determine when the United States will undertake to provide representation to Indians and when the allottee "may be permitted to bring his own action, or, if so brought, (whether) the United States may aid him in its

conduct . . . ." 224 U.S. at 446. Thus, Heckman explicitly contemplates occasions in which the Government's representation would be supplemented by the Indians' separate and independent attorneys. More recently, after reviewing Heckman as well as subsequent decisions, the Court recognized that "the Indian's right to sue should not depend on the good judgment or zeal of a government attorney." Poafpybitty v. Skelly Oil Co., 390 U.S. 365, 374 (1968). See, also, Trbovich v. United Mineworkers, 404 U.S. 528, 538-39 (1972). (Special Master's 1979 Memorandum and Report at 12-14.)

The factual setting of this case is very different from Heckman. The Tribes have intervened to support the claims of the United States and to assert that additional water rights are reserved for their benefit under federal law. Their intervention has been supported by the United States and there is no contention that representation of the Tribes by independent counsel is in any way inconsistent with the Government's statutory obligations. If the Government cannot prevent Indians

from suing, neither should it be permitted to exercise exclusive control over the extent and nature of the tribal claims asserted in the litigation or over the evidence submitted or arguments made in support of those claims.[13]

In the years since the Heckman decision, courts and the Government have become more cognizant of the limitations inherent in the Government's exclusive representation of Indian interests. In the 1934 Indian Reorganization Act, 48 Stat. 984, 987, 25 U.S.C. 8476, Congress determined that proper fulfillment of its trust required turning over to the Indians greater control of their own destinies.[14] "The overly paternalistic approach

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13 Given the choice, tribes might well opt against any litigation at all rather than a suit in which their meritorious claims are not presented by Government attorneys. See, United States v. Truckee-Carson Irrigation District, 649 F.2d 1286 (9th Cir. 1981), petitions for certiorari pending.

14 Several years earlier the Institute for Government Research in an extensive survey of the Indians' social and economic conditions noted the Government's problems in advocating the Indians' interests. Meriam, Problems of Indian Administration, 784 (1928).

of prior years had proved both exploitive and destructive of Indian interests." Morton v. Mancari, 417 U.S. 535, 553 (1974); See also, Mescalero Apache Tribe v. Jones, 411 U.S. 145, 152 (1973); Fisher v. District Court, 424 U.S. 382, 387 (1976); Crowe v. Eastern Band of Cherokee Indians, 506 F.2d 1231, 1236 (4th Cir. 1974). The Indian Reorganization Act manifests a congressional intent to insure, or make possible, maximum Indian development and participation in all matters affecting the development and protection of their resources. These same policies are reflected in more recent legislation. See, White Mountain Apache Tribe v. Bracker, 448 U.S. 136, 143-44 n. 10 (1980).

The courts have also had occasion to comment on the inevitable clash between duty and expedience when Indian interests conflict with politically powerful elements of the dominant society. See, United States v. Ahtanum Irrigation District, 236 F.2d 321 (9th Cir. 1956), cert. den., 352 U.S. 988, following remand, 330 F.2d 897 (9th Cir. 1964), rehearing den. with opinion,

338 F.2d 307 (9th Cir. 1964), cert. den., 381 U.S. 924; United States v. Truckee-Carson Irrigation District, 649 F.2d 1286 (9th Cir. 1981), petitions for certiorari pending; Joint Tribal Council of the Passamaquoddy Tribe v. Morton, 528 F.2d 370 (1st Cir. 1975); Lac Courte Oreilles Band of Lake Superior Chippewa Indians v. FPC, 510 F.2d 198 (D.C. Cir. 1975); Confederated Tribes of the Umatilla Indian Reservation v. Alexander, 440 F. Supp. 553 (D.Or. 1977); Pyramid Lake Paiute Tribe of Indians v. Morton, 354 F. Supp. 252 (D. D.C. 1973).

The other branches of the Government have also recognized the difficulties with governmental representation of Indians. See, President Nixon's Message on Indian Affairs, 116 Cong. Rec. 23395, 23398 (1970); Subcommittee of Economy in Government of the Joint Economic Committee, Toward Economic Development for Native American Communities, 91 Cong. 1st Sess. (Comm. Print 1969) Vol. 2, 460-518; Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, 92 Cong. 1st Sess. (Comm.

Print 1972) 1-3, 6; Chambers, A Study of Administrative Conflicts of Interest in the Protection of Indian Natural Resources, Id. at Vol. 1, 233-49.

Thus, all relevant experience subsequent to the 1912 Heckman decision has demonstrated to all three branches of government that federal officials cannot always be relied on to provide "complete" representation of Indian interests and that such officials are susceptible to political and other influences that undermine the quality and effectiveness of their advocacy.[15] See e.g., United States v. Truckee-Carson Irrigation District, 649 F.2d 1286, 1301 (9th Cir. 1981), petitions for certiorari pending; Manygoats v. Kleppe, 558 F.2d 556 (10th Cir. 1977); New Mexico v. Aamodt, 537 F.2d 1102, 1106 (10th Cir. 1976), cert. den., 429 U.S. 1121. Congress, the Executive branch and the courts have responded by

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15 As noted supra at 26, the Court in Heckman recognized that separate and joint representation would be appropriate in some instances.

authorizing, encouraging and making possible separate and independent representation of Indian tribes in litigation.

The Court should take cognizance of these realities. And its determinations should, to the maximum extent possible, reflect and implement Congress' contemporaneous Indian policies. Bryan v. Itasca County, 426 U.S. 373, 386-87, 388 n. 14 (1976); Moe v. Confederated Salish & Kootenai Tribes, 425 U.S. 463, 477-79 (1976).

In this case, following a thorough review of the record, the Special Master found that the Government's performance in the prior proceedings was deficient. (Special Master's Report at 46-52.) This finding, coupled with the manifest unfairness resulting to the Tribes, congressional policies promoting the Tribes' economic self-sufficiency and self-determination and preventing the loss of tribal property through the inadvertence, omissions or misconduct of Government officials, justified the Special Master's recommendations

that the Tribes be provided their own day in Court to assert their claims for sufficient water to irrigate all of their practicably irrigable acreage.

II. THE 1964 DECREE MAY BE MODIFIED TO ALLOW FOR ALLOCATION OF WATER FOR THE OMITTED LANDS UNDER ARTICLE IX OF THE DECREE.

The States contend that, in considering water rights for the omitted lands, the Special Master erred in concluding: (1) that Article IX of the 1964 Decree authorized reopening of the Tribes' reserved rights;[16] (2) that neither the principles of res judicata nor law of the case precluded such reconsideration; and (3) that failure to consider such claims would result in manifest injustice to the Tribes. (States' Brief at 23.) The Tribes submit that the Special Master's conclusions were correct with respect to all three issues.

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16 Article IX of the 1964 Decree provides: "Any of the parties may apply at the foot of this decree for its amendment or for further relief. The Court retains jurisdiction of this suit for the purpose of any order, direction, or modification of the decree, or any supplementary decree, that may at any time be deemed proper in relation to the subject matter in controversy."

A. Article IX Empowers the Court to Modify the 1964 Decree and Grant the Claims for Omitted Lands.

The States admit that, on its face, Article IX "is expansive and provides seemingly unlimited authority for the Court to reopen, reconsider, revoke or modify previously litigated legal conclusions and factual findings." (States' Brief at 24.) They nonetheless insist that read in the context of the prior proceedings and the objective to establish with finality the scope of the Tribes' rights, Article IX precludes reexamination of such rights. (States Brief at 24.)

The lengthy history of this case does not support the States' narrow construction of Article IX. The filing of this case in 1952 presented the Court with a multitude of complex, unique and novel issues, which were subsequently referred to Former Master Rifkind for preliminary consideration. By admission of the States, consideration of the Indian claims before the Former

Master was then "secondary compared with the other issues." (States' Brief at 57.) This fact, coupled with the lack of definition of the Winters[17] doctrine, caused great confusion and uncertainty among the attorneys and the Former Master in determining the scope of Indian water rights.[18] It is not surprising then that the Former Master recommended, and this Court adopted, the broad language of Article IX to avoid "the possible claim that this Court may not alter or modify its rulings herein on the basis that the Decree is res judicata of the issues sought to be considered or reconsidered" as the Court "should not desire to find itself embarrassed by a provision in the Decree or ruling if the United States or parties can later convince this Court that this Court's

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17 Winters v. United States, 207 U.S. 564 (1908).

18 Numerous references of the States and Special Master to portions of the record of the earlier proceedings before the Former Master demonstrate the confusion of the participants. See, States' Brief at 25-26, Appendix A; Special Master's Report at 32-33.

determination has been erroneous or unworkable."[19] (Supplement and Amendment to Imperial Irrigation District's Form of "Decree of Court as Heretofore and Herewith Submitted" 11 (Dec. 1963) (emphasis added).) Article IX was not intended to create an "open-end" decree, but from its language it is apparent that the Former Master and the Court intended to retain jurisdiction to correct errors such as occurred in the prior proceedings.

Contrary to the States' view, redetermination of the Tribes' rights at this time, under these circumstances, is not inconsistent with the objective of

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19 This statement is the only reference in the original proceedings to the purpose of Article IX and supports the Master's conclusion that broad modifications were authorized. This conclusion the Special Master was quick to point out, "does not mean that any wide-ranging amendment would be made . . . Matters once litigated and decided should not be reconsidered absent some good reason. Such concerns, however, are addressed to the exercise of the Court's sound judgment rather than its power." Special Master's Report at 35 (emphasis in original).

finality. The Tribes' motions for modification of their rights under the 1964 Decree were filed in 1977 and 1978, well before the present perfected rights of the non-Indians were determined by the Supplemental Decree of January 9, 1979.[20] The Tribes' request for revision, then, came before any substantial degree of finality was obtained. Further, the rights of the Tribes themselves were not finally fixed by the 1964 Decree. Under Article II(D), modification was expressly authorized with respect to the Colorado River and Fort Mojave reservations in the event boundaries should become finally determined. And, comparable revisions, the States agree, were implicitly authorized under Article IX for the other three reservations. (Special Master's Report at 56 n. 73.) As noted above, the broad language

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20 The Tribes were awarded 905,496 acre feet of present perfected rights by the 1964 Decree, 376 U.S. 340. Under the Supplemental Decree of 1979, the non-Indian present perfected rights were fixed at 3,143,550 acre feet (excluding miscellaneous rights), 439 U.S. 419.

of Article IX was additionally inserted for the correction of substantial error in the prior proceedings. Thus, all parties were on notice that neither the rights of the Indians nor non-Indians were finally fixed by the 1964 Decree

The States would read Article IX narrowly "as a safety-net to provide a convenient means for dealing with matters not litigated below and dealt with in the Decree." (States' Brief at 32.) The rejoinder of the Special Master to one of the States' earlier constructions of Article IX[21] is equally applicable to that proposition:

[21] The States' position on the meaning of Article IX has changed considerably. The States previously contended that Article IX was limited "to correction of a genuine mistake of fact such as a mathematical miscalculation" but did not include a correction of mistakes of the kind under consideration here. (Special Master's Report at 34 n. 8.) The Special Master quickly disposed of that construction, noting that the inclusion of a "provision for the correction of merely clerical errors . . . would . . . seem entirely superfluous because a court normally possesses the inherent power to correct its decrees in such a manner." Id. at 34.) The States have also claimed that Article IX merely incorporated the normal aspects of res judicata. The Special Master properly rejected this construction as "unduly restrictive because it renders that provision almost meaningless." (Id. at 34.)

"Had the Court intended to impose the limits urged by the State Parties, the language might have been tailored to fit those limits." (Special Master's Report at 34.) But, of course, it has no such limitations. Under Article IX the Court expressly retained power "for the purpose of any modification of the decree . . . (it) deemed proper." (emphasis added). This language obviously encompasses Indians and non-Indians alike and authorizes amendments of any kind or character. Indeed, it was the very broad language of Article IX which the Special Master found most persuasive in arriving at his conclusion that the omitted lands claims are not foreclosed. (Id. at 33-34.)

Finally, as the Special Master observed, "this case has from the beginning involved a number of complex issues and difficult matters of proof. No one should be surprised that some mistakes occurred earlier. In fact, an absence of mistakes would have been reason for surprise. For just such a reason, water rights decrees often include retention of jurisdiction which may be used to adjust the water rights decreed in the event an error is

discovered." (Special Master's Report at 47.) Article IX, the Master concluded, should therefore be construed "consistent with similar provisions in other cases of this nature . . . to consider any mistakes which the Court might wish to correct. . . ." (Id. at 47.)

The States contend that the reference by the Special Master to similar provisions in prior interstate water dispute decrees is misplaced because those decrees were entered in equitable apportionment cases where each provision was to have addressed resolution of specific issues as expressed in the reports of the Masters. (States' Brief at 28-31.) Even though this is not an equitable apportionment case, the demonstrated use of such provisions to retain broad powers in other original jurisdiction water cases before this Court is the import. The fact that there is in this case no specific reference in Article IX or the Former Master's Report that would suggest a limitation in the application of Article IX enhances rather than detracts from the argument of a broad construction.

B. Neither the Principles of Res Judicata Nor the Doctrine of Law of the Case Preclude Consideration of the Omitted Lands Claims.

The States argue generally that res judicata bars reopening of the 1964 Decree but make no real argument (there is none) to rebutt the conclusion that the doctrine itself is inapplicable because the present motions were filed in the same rather than a different case.[22] Instead, the States insist that its underlying principles apply on two related grounds.

First, they argue that if reconsideration of the omitted lands claims is permitted, "the door is inexorably opened to continued relitigation of the practicably irrigable acreage issue" whenever technological innovations demonstrate that additional reservation lands have become practicably irrigable.[23]

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22 See, Special Master's Report at 31.

23 The States confuse the grounds for reopening a decree with the standards to be applied once a decision to reopen has been made. Special Master's Report at 98.

(States' Brief at 36-37.) The Special Master expressly rejected "changed circumstances, such as new technology regarding irrigability" as grounds for altering the Decree. (Special Master's Report at 35.) He was careful to specify that modification of a decree is not advisable "absent some good reason," (Id. at 35) as here where it is demonstrated that there was clear error in the earlier proceeding resulting in "manifest injustice." (Id. at 36.) If those proceedings and the resulting decree were fair at that time, subsequent changes in technology, regardless of how they might advance the interests of a party were they heard today, are not grounds for modification.

Second, the States maintain that in rejecting the finality principles of res judicata, the Special Master failed to provide an alternative rule which would specify "when and in what circumstances 'enough is enough'." (States' Brief at 37.) The States are wrong. The Special Master explicitly agreed that "the 1964 Decree would have no meaning if it is not accorded some degree of finality" and concluded that the applicable concept for

determining the proper degree of finality was the doctrine of law of the case. (Special Master's Report at 35.) That doctrine, he noted, "differs from res judicata because the latter compels adherence to a prior decision while the former merely directs the Court's discretion. It is a matter of good practice, not a limitation on the Court's power." (Id. at 36.) Applying the law of the case doctrine, the Special Master weighed two factors in determining whether a prior holding may be modified, namely: (1) the justifiable reliance of the parties, and (2) whether the prior holding was clearly erroneous and would work a manifest injustice. (Id. at 36.)

Initially the Special Master acknowledged that "the detrimental impact on (the State) Parties by such an amendment cannot be seriously denied. What the Tribes gain someone else will lose . . . . But the present inquiry centers upon detrimental reliance rather than impact." (Id. at 38) (emphasis added). It is not hard to understand why the Master found "it difficult to determine from the testimony exactly what significant,

different action the State Parties would actually have taken if the Indian reservations had received in 1964 the water rights now requested." (Id. at 46.) The States refer us to no evidence showing that they would have done anything differently had the Tribes received their full entitlement in 1964. Arizona certainly does not claim it would have foregone the Central Arizona Project. The Metropolitan Water District implies, but points to no evidence, that it would have requested more water from the California State Water Project. (States' Brief at 47-50.) The fact is that the Metropolitan Water District after 1964 sought only to replenish the water it lost to Arizona and simply ignored the water the Tribes were awarded. (Special Master's Report at 42-43.) And, Nevada can make no claim of reliance whatsoever. It got confused between diversion and consumption and misread the 1964 Decree as having awarded the Fort Mojaves even more water than they now claim. (Id. at 44-45.)

In short, upon examination, the States' "evidence" of detrimental reliance vanishes. The Master,

nonetheless, gave them the benefit of the doubt, generously concluding that "not a great deal of evidence is really needed to convince anyone that western states would rely upon water adjudications." (Id. at 46.) But, with no significant evidence of detrimental reliance before him, the Master concluded that the manifest injustice to the Tribes in foreclosing their claims outweighed the States' nebulous general reliance and that the claims should therefore be considered. (Id. at 47.)[24]

The States agree that under the law of the case doctrine the evidence of a "grave injustice" is a traditional ground for reconsideration of the Tribes' omitted lands claims. (States' Brief at 38; compare Special Master's Report at 36.) The cases cited by the States and the Special Master require as a ground for

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[24] The Reply Brief for the United States to the States' Exceptions demonstrates in detail the utter failure of the States to prove that they took or failed to take any action as a result of their reliance upon the 1964 Decree and is hereby adopted by the Tribes.

reconsideration clear error in the earlier decision as well as a grave or manifest injustice. Apparently the States concede that there was clear error in the initial proceedings. The States do, however, deny that barring the ommitted lands claims would, in fact, work a grave injustice. (States' Brief at 38-39.) According to the States, the Tribes in the earlier proceedings were awarded their full entitlement of rights in conformance with the standards then employed and evidence there introduced. Therefore, barring their omitted lands claims would not work an injustice because the Tribes have already had one full and fair hearing. (States' Brief at 41-43.)[25]

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25 In the same vein, the States contend that the omitted lands were not really omitted but rather "rejected" because "the United States actually determined in the prior proceedings that (such) lands were not practicably irrigable." States' Brief at 42. How this distinction has any bearing upon the question of fairness of the prior proceeding the States do not reveal. The injury to the Tribes is the same in either case. But in any event, the States are demonstrably in error.

This was not the States' position before the Special Master. As he noted, "One of the few aspects . . . that has drawn agreement among the parties is the existence of irrigable lands which were 'omitted' from the claim for water rights in the earlier proceedings. (The States) admit that the large majority of omitted lands for which water rights are claimed by the United States are practicably irrigable." (Special Master's Report at 47; see also, Stipulation of September 8, 1980, record item no. 91.)

Beyond that, the States themselves are apparently unsure as to whether the Government believed the omitted lands were practicably irrigable in the original proceedings. At one point, they contend that the omitted lands were not claimed because the Government did not believe the lands to be practicably irrigable. (Special Master's Report at 42.) Later, they characterize the Government's failure to claim water for such lands as a "reasoned tactical decision." (States' Brief at 43.) The States cannot have it both ways. Either the Government

knew the lands were irrigable but nonetheless declined to claim them, or it mistakenly believed they were non-irrigable. The former explanation appears unlikely in light of the Government's failure to claim almost one-half of the practicably irrigable lands on the Chemehuevi Reservation,[26] one-sixth of such lands on the Cocopah Reservation, and a grand total of almost 20,000 acres on all five reservations.[27]

Such horrendous gaps in proof cannot be explained let alone justified by a "reasoned tactical decision." Trial tactics might excuse failure to claim

26 Special Master's Report at 192-96. By the 1964 Decree, the Cocopahs were awarded water sufficient to irrigate 431 acres. The Special Master recommended that they receive additional water sufficient to irrigate 1,170 acres including 71 acres of omitted lands. Id. at 196, 281. The States agree with the Special Master that 1,593 of these 1,170 acres are practicably irrigable. States' Brief at 6.

27 By the 1964 Decree, the Chemehuevis were awarded water sufficient to irrigate 1,900 acres. The Special Master recommended that they receive additional water sufficient to irrigate 1,621 acres. Although percentage-wise the magnitude of the Government's dereliction on the larger reservations was smaller, in terms of the actual number of acres omitted, it was vastly greater.

small areas of truly marginal land, but to permanently restrict the water rights of an Indian tribe in the arid desert of the Southwest to half of its entitlement cannot be justified as trial strategy. Whether intentional or unintentional, the fact remains clear that the Tribes were inadequately represented.[28]

The federal reserved water rights of Indian tribes are held in trust by the United States for the benefit of the Indians and, thus, are governmental rights. In the instant case such rights will be lost if the omitted lands claims are precluded, due to the inadequacy of the Government's representation in the initial proceeding. This Court has long held impermissible these types of losses:

> . . . (A)ssuming that Government agencies have been negligent in failing to recognize or

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[28] As the Special Master stated, "I cannot imagine any legitimate reason . . . that would cause the United States to present less than the maximum claims" which they could in good faith make on behalf of the Tribes. Special Master's Report at 52 (emphasis added); see also, Id. at 52 n. 67.

> assert the claims of the Government at an earlier date, the great interests of the Government . . . are not to be forfeited as a result. The Government which holds its interests here as elsewhere in trust for all the people, is not to be deprived of those interests by the ordinary court rules designed particularly for private disputes over individually owned pieces of property; and officers who have no authority at all to dispose of Government property cannot by their conduct cause the Government to lose its valuable rights by their acquiescence, laches, or failure to act.

United States v. California, 332 U.S. 19, 39-40; see also, Cramer v. United States, 261 U.S. 219, 234 (1923); Utah Power and Light Co. v. United States, 243 U.S. 389 (1916); United States Immigration and Naturalization Service v. Hibi, 414 U.S. 5 (1973).

Preclusion of the omitted lands claims due to the failures of the Government's representatives at the prior hearings would also be inconsistent with Section 16 of the Indian Reorganization Act, 48 Stat. 984, 987, 25 U.S.C. §476, prohibiting the disposition of tribal interests without the consent of the tribe, as well as the Indian

Non-Intercourse Act, 25 U.S.C. §177, which prohibits the disposition of Indian interests without the consent of Congress.

Notwithstanding the absolute necessity of adequate water for the reservations, the States attempt to justify preclusion of the omitted lands claims on the ground that there is no evidence to show that rejecting them would "frustrate the purposes of the reservations," or jeopardize the Tribes' ability to meet their "reasonable needs." (States' Brief at 39-40.) Again the States overlook the record, which establishes that barring such claims would unquestionably "frustrate the purposes of the reservations" and jeopardize the Tribes' ability to meet their "reasonable needs."

The evidence pertaining to the smaller reservations is particularly persuasive. The Cocopah Tribe, for example, has 460 members living on the reservation. (Tr. at 1424.) By the 1964 Decree the Cocopahs were only awarded enough water to irrigate 431

acres, or less than an acre per member. The average-sized farm in Arizona, however, is 501 acres.[29] The irrigable acreage ratios on the Chemehuevi and Quechan Reservations under the 1964 Decree are of similar magnitude - 4 plus acres per capita.[30] And, although the ratios on the Fort Mojave and Colorado River Indian reservations are somewhat higher, satisfaction of their "reasonable needs" would likewise be jeopardized if restricted to their 1964 rights.[31] This point was recently

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29 Farm Numbers, Statistical Reporting Service, U.S. Dept. of Agriculture (Dec. 28, 1981).

30 There are slightly more than 400 members of the Chemeheuvi Tribe. Tr. at 1433. By the 1964 Decree, the Chemehuevis were awarded water sufficient to irrigate 1,900 acres - 4 plus acres per capita.

There are 1,700 members of the Quechan Tribe. Tr. at 1455. By the 1964 Decree, the Quechans were allocated the water required to irrigate 7,743 acres - 4 plus acres per capita.

31 There are 723 members of the Mojave Tribe. Tr. at 1383. By the 1964 Decree the Mojaves were granted the water necessary to irrigate 18,974 acres or 26 plus acres per capita.

There are 2,300 members of the Colorado River Indian Tribes. By the 1964 Decree, the Tribes were awarded water sufficient to irrigate 107,588 acres or 40 plus acres per capita.

demonstrated by the House of Representatives. On May 6, 1982, it passed H.R. 5539, which increased from 160 to 960 the acreage ownership limitation on farms eligible to receive federal reclamation waters on the ground that farmers could not make a living on 160 acres.[32] If it takes 960 irrigable acres for a non-Indian farmer to make a living, an Indian farmer on one of the five reservations cannot be expected to make a living on a tiny fraction of such acreage.

The Court's own opinion in this case recognizes that Colorado River water is the sine qua non of life on these reservations:

> Most of the land in these reservations is and always has been arid. If the water necessary to sustain life is to be had, it must come from the Colorado River or its tributaries. It can be said without overstatement that when the Indians were put on these reservations they were not considered to be located in the most

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[32] H.R. Rep. No. 458, 97th Cong., 2d Sess., House Committee on Interior and Insular Affairs, March 15, 1982 on H.R. 5539.

> desirable area of the Nation. It is impossible to believe that when Congress created the Great Colorado River Indian Reservation and when the Executive Department of this Nation created the other reservations they were unaware that most of the lands were of the desert kind - hot, scorching sand, - and that water from the river would be essential to life of the Indian people and to the animals they hunted and the crops they raised. 373 U.S. 598-599.

The Government's failure, we submit, to claim water for these "hot, scorching sands" - for whatever reason - was manifestly unjust to the Tribes and should now be corrected under Article IX of the Decree.[33]

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[33] Having determined that consideration of the omitted lands claims was authorized by Article IX, the Special Master found it unnecessary to rule on the Tribes' argument that the Government's conflict of interest in the prior proceedings prevented preclusion of such claims. Special Master's Report at 54. Should the Court conclude that consideration of the ommitted lands claims is not authorized by Article IX, the latter issue should be remanded for hearing and recommendation by the Special Master.

III. THE SPECIAL MASTER PROPERLY CONCLUDED THAT THE BOUNDARIES OF THE RESERVATIONS ARE "FINALLY DETERMINED".

The States except to the Special Master's finding that certain boundaries of the reservations are "finally determined" under the 1964 Decree. The Tribes challenge the States' Exception and request this Court to adopt the Special Master's findings and award the additional present perfected rights claimed by the Tribes for practicably irrigable lands found to be within the reservations as a result of boundaries being finally determined. In reply to the States' Exception and in support of their claims, the Tribes hereby adopt the argument of the United States pertaining to such claims, as set forth in the Reply Brief for the United States.

IV. THE SPECIAL MASTER PROPERLY DETERMINED THE NUMBER OF PRACTICABLY IRRIGABLE ACRES ON EACH RESERVATION.

A. The Tribes' Analysis and Findings of the Special Master Were Proper.

The United States retained experts to analyze the irrigability of reservation lands. They concluded that substantial amounts of land were practicably irrigable but were not included in the prior Decree (hereinafter "United States' claims"). The Tribes also retained experts to analyze the reservation lands. Although the Tribes agreed generally with the United States' claims, they concluded that there were additional lands which were practicably irrigable and not claimed by the Government (hereinafter "tribal claims").

The parties approached the evaluation of the lands somewhat differently. The Tribes' experts defined practicably irrigable land on the basis of a plan for development over a period of twenty to thirty years, commensurate with the financial capabilities of the Tribes. (Tr. at 6500.) The States by contrast evaluated

the lands in terms of whether a prudent farmer would now decide that it would be profitable or unprofitable to develop his land. (Tr. at 46.) The tribal claims are based upon the planting of permanent tree and vine crops in conjunction with traditional field and row crops such as alfalfa and cotton. (Tr. at 6500.) The States from the outset rejected the concept of permanent crops for the reason that a prudent man would not risk his money on permanent crops with no commercial history in the area. (Tr. at 50.) We contend that the immediacy of the investment question with which the States approached the problem was wrong in that it tended to ignore the future needs of the Tribes for which water was to be reserved. Arizona v. California, 373 U.S. 546, 600 (1963).

Permanent tree and vine crops take more time and money to establish but typically generate a higher return than do field crops. (Tr. at 1058.) The lands covered by the tribal claims are generally higher above or farther from the river than the United States' claims and the cost of getting water to them is therefore

greater. The traditional field and row crops will not generate enough income to pay for irrigating these higher lands. The Tribes' experts investigated several permanent crops which grew in similar environments to see whether they would grow on the Colorado River and whether they would be economically feasible there. (Tr. at 1049.) Costs of growing the crops and income to be realized were then projected and compared to determine whether a given crop would be profitable. (Tr. at 1050-1052.) If this analysis indicated that the growing of a crop was profitable, or economically feasible, on certain land, that land was designated as practicably irrigable and included in the tribal claims.

The Tribes' experts came to the conclusion that pistachios, figs, almonds and table grapes could be grown profitably on various parts of the reservations which had not been designated practicably irrigable in the earlier proceeding. The States continue to contend that no permanent crops can be grown profitably on the reservations and deny every acre of the tribal claims.

The Special Master determined that some parcels of land claimed to be practicably irrigable by the Tribes were non-arable, that is, not suitable for the commercial production of any of the proposed crops. The reasons included flooding, high water tables, irregularity of boundaries, rough or steep topography, etc. (Special Master's Report at 252, 261, 268, 271.) The Special Master rejected the Tribes' claims that pistachios would grow in the lower Colorado River area and did not consider them in evaluating the irrigability. (Special Master's Report at 203.) The Special Master did accept our contention that figs were suitable and would grow. He decided, however, that the yield to be expected from figs was lower than we contended and that the income would not be enough to cover the cost of getting water to the land. He therefore rejected figs as unprofitable. (Special Master's Report at 221.) The Special Master determined that almonds, on the other hand, woud grow and would be profitable on all the lands covered by the tribal claims. (Special Master's Report at 217-218.) He

concluded that grapes clearly would also be a feasible and profitable crop on the tribal lands. (Special Master's Report at 221.)

The elimination of two of the permanent crops projected by the Tribes does not defeat any part of our claim of practicable irrigability. While a cropping pattern including figs and pistachios was assumed on some of the land, this was for calculation and projection purposes. It was pointed out by the Tribes' experts that, based upon market factors and other conditions over the twenty or thirty year development period, actual planting patterns could be different and different crops might prove to be more advantageous. (Tr. at 7111-7113.) The Special Master decided that the practicable irrigability of land was shown by proving its ability to support almonds or grapes, or any crop, even though different crops or no crops might ultimately be grown on it. (Special Master's Report at 273.)

The experts for both sides analyzed the amount of practicably irrigable land on the basis of

current prices, costs and technology. The Special Master decided that the only sensible way to determine practicable irrigability was to use present standards. Once the decision to reopen the 1964 Decree is made, the reference to past standards would add complications to an already complex case. (Special Master's Report at 98.)

The State of Arizona took exception to the Special Master's refusal to apply technology as of the time the reservations were created. (Arizona Brief at 36.) No other exceptions to the use of current data and technology were made. Ignoring known changes and analyzing the irrigability of the Colorado River Reservation in 1865, for example, would be a totally unrealistic way to deal with the present and future needs of the Indians. The Special Master considered the difficulty and unreliability of inquiring into nineteenth century technology in reaching his decision to consider current information. (Special Master's Report at 98 n. 24.)

B. State's Exceptions Are Unsupported By the Record.

1. Bias. The States see a double standard and predisposition against them in the Special Master's failure to agree with their experts on all points. The Special Master did not accept fully the contentions of any party and the unseemly charge that he was prejudiced is totally refuted by the facts and the thorough analysis set forth in the Special Master's Report.

In some cases the Special Master rejected contentions of the Tribes which were supported by strong evidence. For example, pistachios were rejected because the Special Master decided that there were not enough chilling hours in winter on the reservations. (Special Master's Report at 198.) There was much conflicting technical and theoretical evidence on just what chilling hours were, their impact, how they should be measured, etc. We thought that the theoretical questions were resolved by our showing that there were

the same number of chilling hours along the Colorado River as at Bakersfield, California, where pistachios are successfully grown. The Special Master disregarded that uncontradicted evidence because it "simply fails to convince" him. (Special Master's Report at 199.) We thought that the scientific dispute over the suitability of pistachios was resolved by the undisputed fact that pistachios are grown, and very high yields are achieved, only fifty miles to the east of the reservations in Wenden, Arizona. (Tr. at 6212-6213.) The Special Master disposed of that item by ignoring it. The Tribes also contended that the appropriate almond yield was 2,750 pounds per acre and the States claimed that 2,000 pounds per acre was correct. The Special Master observed that, "Neither side appears to be completely correct" and that "(t)he truth, I believe, lies between the figures advocated by the litigants." He then adopted the rock-bottom 2,000 pound figure presented by the States. (Special Master's Report at 207, 208, 212, 214.) Such subjective determinations by the Special Master hardly indicate the predisposition toward the Tribes perceived by the States.

Some testimony was so weak that it was not only unworthy of consideration itself, but cast doubt upon the credibility of the States' claims in general. For instance, one State expert testified that a certain 1,600 acre parcel of reservation land should be classified as non-arable. He said that he based this conclusion on a "very rough look" and that he had "just made a figure out of the air." (Tr. at 3091, 3392.) It did not require bias for the Special Master to cast such testimony aside. (Special Master's Report at 272.)

The States cite the Special Master's failure to accept their grape prices as the most egregious and prejudicial example of his double standard. (States' Brief at 84.) As set forth in more detail below, the States' grape price contentions were based on a nonexistent "Arizona market" and an exhibit (States' Exhibit 184) which was sharply criticized and totally rejected by the Special Master.

2. Consideration of Permanent Crops. In the early stages of the hearing the States objected to the

very concept of considering permanent crops in evaluating the practicability of irrigation. The reason given was their conclusion that a prudent man would not risk his money on permanent crops with no commercial history in the area. (Tr. at 50.) They have retreated from that position. The States refer to the failure of the United States' expert economist to consider permanent crops. They do, however, adopt that expert's statement that the fact that crops have not been grown extensively in an area does not necessarily mean that they cannot be grown economically, but that lack of present crop history does raise a question about economic viability. (States' Brief at 96; Tr. at 769.) The States then concede that consideration of permanent crops was not "wrong per se" but caution that "great care must be taken in reaching any conclusion regarding profitability." (States' Brief at 97-98.) We agree, that is exactly what has been done. Great care was used by the Tribes' experts in compiling and analyzing much data, as described in the reports (Exhibits CH-1, CR-1, FM-2, FY-19), in the individual

exhibits, and in the testimony of many witnesses over a period of several weeks. The Tribes' experienced engineering expert knew of no agricultural analysis with the depth and detail of this one. (Tr. at 6501-02.) The Special Master's Report itself shows the meticulous attention devoted by him to all the evidence. After much consideration, the Special Master came to the conclusion that some of the land claimed was practicably irrigable and some was not. The Special Master certainly met the States' "great care" standard and his findings should not be disturbed on the grounds that he considered permanent crops.

3. Market Impact. The States suggest that the projected plantings of almonds and grapes on the reservations would create a glut on the market which would destroy the present price structure. They then admit that this would not be a major problem with almonds because the almond market is big enough to absorb some increases in acreage without a major effect on prices. (States' Brief at 107.) There are 357,000 acres

of almonds under cultivation and this is increasing at from 7,000 to 12,000 acres per year. (Tr. at 1334.) If the Tribes planted 5,000 acres of almonds over twenty years, the 250 acre annual increase would be insignificant. (Tr. at 1333-1334.) The suggested almond glut due to reservation plantings is thus not a matter for concern.

There were 95,000 acres of table grapes under cultivation in California and Arizona in 1979 and the annual increase is 2,000 to 2,500 acres. (Tr. at 1334.) If, as suggested by the States, 10,000 reservation acres are planted in grapes, the average increase over twenty years would be 500 acres per year. This would be only a 1/2 of 1% annual increase in the total acreage. Table grapes are very profitable (Tr. at 1871-72, 4825, 5559), and there is no evidence that such a small increase in supply would be disruptive to the market structure. The "small Arizona grape market" upon which the States predicate their grape glut (States' Brief at 108) simply does not exist. Reservation grapes would be part of the overall Arizona and California market. (Special Master's Report at 237.)

4. Almond Prices and Yields. The States take exception to the Special Master's use of a three year average price for almonds. This was not the price proposed by either party but was based upon firm data and arrived at by the Special Master in accordance with the method prescribed by the States' expert. (Tr. at 4083.) The Special Master used the payment capacity calculation method prescribed by the States and came to the conclusion that almonds are economically feasible. (Special Master's Report at 216-217.)

5. Grape Prices and Yields. Nothing in this case is more clear than that the table grape business is a very profitable one (Tr. at 1871, 4825, 5559) and that grapes would be profitable on the reservations. Even the 4.4 ton per acre yield projected by the States exceeds the 3.85 ton yield at which grapes are profitable. (Exhibit FY-43.) The Special Master recognized that actual yields would be higher (Special Master's Report at 238), and yields up to 8.6 tons were acknowledged by the States. (Tr. at 7238.) The $867 per ton price used by the Special

Master was very conservative in comparison with the $955 Arizona price (Exhibit CR-56; Tr. at 7240), and the $1,364 Coachella price (Tr. at 5559). On the grape issue the States resorted to a last minute exhibit (Exhibit SP-184) which contained incomplete and unexplained statistics selected by their experts. The exhibit, if believed, would mean that grapes are generally unprofitable and that just is not so. The Special Master considered Exhibit SP-184 at length and stated that it was confusing, virtually meaningless, based upon assumptions not in the record and unpersuasive. He rejected it as misleading and refused to consider it for any aspect of the case. He said the use of such an exhibit created serious doubt about the credibility of the States' claim. (Special Master's Report at 225, 228, 229, 235.)

C. Large Portions of Lands for Which Allocation of Water Is Sought by the Tribes Are Admittedly Practicably Irrigable.

The arguments about the amount of practicably irrigable acreage do not pertain to the United

States' claims on the Colorado River Indian Reservation because they are stipulated. The United States, on behalf of the Colorado River Indian Tribes, claimed that 23,145 gross acres of land on their reservation was practicably irrigable but was not included in the prior Decree. The response of the States' experts was that 20,471 acres of the United States' claims were practicably irrigable. (States' Exhibit 26-Table 1.) The Colorado River Indian Tribes joined with the United States in its claim and asserted their own claim that an additional 8,662 acres were practicably irrigable. (Exhibit CR-1, Table A-2.) The parties stipulated that 21,634 of the acres covered by the United States' claim are practicably irrigable. (Stipulation, Sept. 8, 1980, record item no. 91.)

The States concede that over eighty per cent of all omitted lands claimed by the United States is practicably irrigable. (See, Special Master's Report at 106-111.) Although the States deny that virtually all of the omitted lands claimed by the Tribes beyond the Government's claims are practicably irrigable, they do

concede that over fifty per cent of the omitted lands claimed by the Tribes and the United States together are practicably irrigable. We submit that the States admissions illustrate the injustice resulting from the first proceeding that should now be corrected. This correction should not be limited to that acreage which is beyond question and therefore agreed to by the States. It ought to extend to all acreage which is in fact practicably irrigable, as determined by the Special Master in this case.

CONCLUSION

All Exceptions of the States to the Special Master's Report should be rejected. Except as specified in the Exceptions of the United States and Supporting Memorandum, to which the Tribes fully concurred, the recommendations made in the Special Master's Report should be approved and the proposed Decree entered by the Court.

Respectfully submitted,

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